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BEFORE THE

Federal Communications Commission

JAN 25 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 12)
and 19 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-265

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE
AND THE
CONSUMER FEDERATION OF AMERICA

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SUMMARY

In enacting the Cable Act, Congress determined to increase competition and diversity in the programming market, to increase the availability of programming in rural and non-cabled areas, and to spur the development of new technologies. To accomplish these objectives, the Cable Act states that it is unlawful for program vendors to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent a distributor from providing programming.

Congress instructed the FCC to implement this statutory ban by prescribing rules which, at a minimum, prohibit discrimination by vertically-integrated cable programmers against other multichannel video programming distributors. The Commission's Notice falls far short of honoring this clear Congressional directive.

Rather than simply implementing the new statutory ban against discrimination, as directed by Congress, the Commission's Notice proposes as many "loopholes" as is possible to justify discrimination by the cable industry against other distributors. In its Notice, the Commission fails even to acknowledge the seriousness of the

discrimination problem identified by Congress. No attention is devoted to the promotion of new, competing technologies or to the critical issue of bringing rural Americans into the modern telecommunications age.

Instead, the Commission proposes in its Notice to place roadblocks and hurdles before distributors challenging a cable programmer's discriminatory practices. For instance, the Commission proposes to impose a "threshold requirement" of demonstrable "harm" before discrimination would become actionable in any particular case. The statute, however, does not permit the Commission to require an independent showing of "harm." Discrimination per se is prohibited by the statute, unless justified by the programmer.

Similarly, the Commission proposes to "grandfather" all existing, nonconforming contracts. The statute, however, does not allow the Commission to "grandfather" these types of contracts. Blanket "grandfathering" would defeat the very purpose of the strong program access provisions adopted by Congress.

The Commission's efforts must be fundamentally re-directed along the lines established by Congress. The Commission must adopt rules which, at a minimum, firmly and clearly prohibit discrimination.

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**COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE
AND THE
CONSUMER FEDERATION OF AMERICA**

The National Rural Telecommunications Cooperative ("NRTC") and the Consumer Federation of America ("CFA") hereby submit these Comments, pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), in response to the Commission's Notice of Proposed Rule Making ("Notice"), released in the above-captioned proceeding on December 24, 1992.^{1/}

^{1/} Notice of Proposed Rule Making, 58 Fed. Reg. 328 (January 5, 1993).

I. PRELIMINARY STATEMENT

1. NRTC is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. NRTC was incorporated on August 6, 1986, through the joint effort of the National Rural Electric Cooperative Association ("NRECA"), the national service organization for rural electric cooperatives, and the National Rural Utilities Cooperative Finance Corporation ("CFC"), the private national financing bank owned by rural electric cooperatives, in conjunction with the National Telephone Cooperative Association ("NTCA"), the national service organization of rural telephone systems.

2. CFA is a federation of 240 pro-consumer organizations with some 50 million individual members. Since 1968, it has sought to represent the consumer interest before federal and state policymaking and regulatory bodies.

II. BACKGROUND

3. NRTC's mission is to assist member companies in meeting the telecommunications needs of the 60 million consumers who live in the rural areas of the United States.

Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis, in an easy and convenient manner -- just like cable television services are provided in urban America.

4. Currently, using C-Band technology, NRTC and its Members provide various packages of satellite-delivered programming, called "RuralTV[®]," to more than 70,000 Home Satellite Dish ("HSD") subscribers. C-Band technology requires the use of 6 to 12 foot receiving antennas.

5. Using C-Band delivery technology, NRTC provides the same administrative marketing and consumer support to programmers as does a cable operator using hard-wired cable. NRTC renders one monthly payment for all of its subscribers, just like a cable operator. As NRTC utilizes its own "port" at the General Instrument ("GI") DBS Authorization Center, the subscribers' descramblers are directly authorized and controlled by NRTC without the need for additional costs to satellite cable or broadcast programmers.

6. NRTC's current C-Band programming packages are based on the cable model. NRTC offers basic packages with

an option to add network services, premium channels and other "tiers" of programming, including additional basic services, superstations and regional sports networks. NRTC is required, however, to pay unfair and discriminatory prices for satellite cable and broadcast programming when compared with prices paid by even the smallest cable operators. This results in price discrimination against subscribers residing in rural and noncabled areas of the country and has effectively barred access to programming for 10 to 12 million rural Americans.

7. NRTC has testified repeatedly before Congress concerning the necessity of program access legislation.^{2/} NRTC also has addressed the issue of discriminatory pricing in numerous Commission proceedings.^{3/} As described in

2/ See, e.g., Statement of Bob Phillips, Chief Executive Officer, NRTC, Hearings Regarding the Cable Television Consumer Protection Act of 1991, S. 12, Communications Subcommittee, Senate Committee on Commerce, Science and Transportation, March 14, 1991.

3/ See, Comments and Reply Comments of NRTC in MM Docket No. 89-600, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, March 1, 1990, and April 2, 1990, respectively; Comments and Reply Comments of NRTC in General Docket No. 89-88, Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, June 30, 1989, and July 31, 1989, respectively; and Further Comments and Further Reply Comments of NRTC, Id., August 27, 1990 and October 23, 1990, respectively.

detail in those proceedings, NRTC has been required to pay satellite cable and broadcast programmers, on average, **460%** more than small cable companies are required to pay for the identical programming. The pricing disparity between NRTC and small cable companies for NRTC's 18 channel Basic Plus Service, for instance, has ranged from a low of **233%** to a high of **780%**. In dollars and cents, this means that NRTC has been required to pay more than **\$10** at wholesale for 18 channels while a small cable operator serving the same or fewer subscribers would pay less than **\$2.25** for the same 18 channels.

8. With respect to satellite broadcast programming alone, NRTC has been required by satellite carriers uplinking over-the-air broadcast signals to pay **500%** to **800%** more than cable distributors pay for the same satellite carriage. After being directed by Congress to examine the problem of satellite carrier discrimination, the Commission determined in its Second Report to Congress that some satellite carriers were charging "unjustifiably higher rates" to some HSD distributors than to some cable operators for superstation and network station programming. Id., Errata at ¶ 3. Nevertheless, no corrective action was taken

by the Commission.^{4/}

9. On April 22, 1992, NRTC signed an Agreement with Hughes Communications Galaxy, Inc. ("Hughes"), to provide high-powered Direct Broadcast Satellite ("DBS") services to subscribers across the country. Under the Agreement, NRTC, its members and affiliated companies purchased satellite capacity and other necessary services to market and distribute 20 channels of popular cable and broadcast television programming to rural households equipped with 18-inch DBS satellite receiving antennas. The service is expected to be offered in April, 1994. When the system is fully deployed, and assuming programming is available, more than 100 channels of movies, sports, networks, cable and other entertainment and information services will be available across the continental United States by direct-to-home satellite.

10. Under its Agreement with Hughes, NRTC/Hughes will operate an independent DBS delivery system comprised of

^{4/} When NRTC filed Formal Complaints against the satellite carriers alleging violations of the antidiscrimination provisions contained in Section 202 of the Communications Act, they were dismissed by the Commission on the ground that the then existing nondiscrimination requirements did not apply to noncommon carriers. NRTC v. Southern Satellite Systems, Inc., 7 FCC Rcd 3213, 3214 (1992).

uplinking and control services necessary to send signals to the satellite and maintain its operation, ground services, security services, authorization and billing services and office support and related services. The NRTC/Hughes "stand-alone" DBS delivery technology is equivalent to a hard-wired cable operator's system for purposes of receiving programming and distributing it to the end-user consumer. No additional costs whatsoever will be incurred by programmers serving NRTC through the DBS system as compared to serving a cable operator using hard-wire delivery technology.

11. In its Cable Report concerning Competition, Rate Deregulation and the Policies Relating to the Provision of Cable Service, released June 31, 1990, the Commission recommended that Congress take action to promote the emergence of alternative multi-channel distributors. The Commission found that emerging alternative multi-channel video providers could provide vigorous competition to cable -- if they gain fair access to programming.^{5/}

12. In an attempt to gain fair access to programming, NRTC and NRECA and their members, primarily consumer owned

^{5/} Cable Report, 5 FCC Rcd 4962, 4972, 5020 (1990).

cooperatives, were actively involved with Congress in the development of the so-called "program access" provisions now contained in Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, (1992) (the "Cable Act"). These provisions were designed by Congress to prohibit vertically integrated cable programmers from discriminating against distributors using competing delivery technologies such as HSD, DBS and wireless cable.

13. CFA and its members also played an active role in promoting passage of the program access provisions contained in the Cable Act. CFA and its members have a direct interest in the rules implementing the Cable Act which affect the availability of diverse video programming to all Americans, and which involve the promotion of reasonable cable rates through the expansion of competition to the cable industry.

14. In enacting the program access provisions of the Cable Act, Congress determined that it was in the public interest to increase competition and diversity in the programming market, to increase the availability of programming in rural and non-cabled areas and to spur the development of new technologies. [47 U.S.C. 548(a)]. To

accomplish these objectives, Congress determined that it would be unlawful for program vendors to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent a distributor from providing programming. [47 U.S.C. 548(b)]. The FCC was directed to implement this statutory ban by enacting rules which, at a minimum, prohibit discrimination. [47 U.S.C. 548(c)(1), 47 U.S.C. 548 (c)(2)].

15. Rather than simply implementing the clear Congressional ban against discrimination, the Commission's Notice proposes to the cable industry as many "loopholes" as is possible to justify discrimination. The Commission fails even to acknowledge the seriousness of the discrimination problem, choosing instead to place roadblocks and hurdles before distributors challenging a cable programmer's discriminatory practices.

16. The FCC's Notice is inconsistent with clear Congressional intent, contrary to the plain language of the statute, and incompatible with the public interest. The Commission's efforts must be fundamentally re-directed along the lines envisioned by Congress when it adopted the Cable

Act. The Commission must adopt rules which, at a minimum, firmly and clearly prohibit discrimination.

III. COMMENTS

A. No Independent Demonstration of "Harm" is Required Under the Statute

17. In Paragraphs 10 and 15 of its Notice, the Commission establishes its analytical framework for application of the nondiscrimination requirements contained in Section 19. The Commission fails to view Paragraph (2) of Section 19 ("Minimum Contents of Regulations") as establishing per se violations of the statute. Instead, the Commission asks what specific demonstration of "harm" it should require under Paragraph (b) before discrimination would become actionable under Paragraph (2).

18. The Commission asks whether the necessary threshold showing should consider harm (i) to consumers in a particular relevant market, or (ii) to other multichannel video distributors in the relevant market or (iii) to both consumers and other multichannel competitors. The Commission asks what geographic area would be relevant in determining whether certain anticompetitive behavior causes harm in a given market (¶ 13).

19. *In Footnote 27, the Commission asks whether certain price differentials should be permitted if they adversely affect multichannel competitors but cause no harm to consumers as measured by the availability or amount of programming in a relevant market. In Footnote 26, the Commission raises multiple questions regarding the type of evidence necessary for determining the existence of "anticompetitive harm."*

20. Congress articulated the public policy objectives of the "program access provisions" of the Cable Act in Section 628(a):

PURPOSE - The purpose of this section is to promote the public interest...by increasing competition and diversity in the multichannel video programming market, to increase the availability of...programming to persons in rural and other areas...and to spur the development of communications technologies. 47 U.S.C. 548(a).

21. To accomplish these objectives, Congress established a broad prohibition in Section 628(b):

PROHIBITION - It shall be unlawful...to engage in...acts or practices, the purpose or effect of which is to hinder

significantly or to prevent any multichannel programming distributor from providing...programming to subscribers or consumers.
47 U.S.C. 548(b).

22. In Section 628(c)(1), Congress directed the FCC to prescribe regulations to specify "particular conduct" that is prohibited by Section 628(b). In Section 628(c)(2), Congress established the "Minimum Contents" of these regulations, including very specific prohibitions against discrimination in price, terms and conditions in the sale or delivery of programming by certain program vendors against other multichannel video programming distributors.
47 U.S.C. 548(c)(2)(B). The only "justifications" for discrimination are included in the statute, as well.
47 U.S.C. 548 (c)(2)(B)(i)-(iv).

23. The Commission seems to believe, however, that discrimination should be prohibited in a particular case only if it amounts to an "unfair method of competition or unfair or deceptive act or practice, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." See, 47 U.S.C.

548(b) and (c). This is not what Congress intended, nor what the statute requires.

24. Congress never envisioned -- nor does the statute permit the Commission to require -- that individual distributors demonstrate on a case-by-case basis that some type of specific "harm" is caused by a program vendor's discrimination. By its express language, Section 628(b) does not establish a "threshold showing" which must be met before Section 628(c)(2) becomes applicable. To the contrary, Section 628(b) sets forth a broad prohibition which the Commission was directed to implement by promulgating regulations under Section 628(c) which, at a minimum, prohibit discrimination.

25. Discrimination, therefore, is unlawful per se under Section 628(b) and is to be prohibited by the FCC under Section 628(c) unless explicitly "justified" by the program vendor. Rather than simply prohibiting discrimination, however, the FCC has misconstrued Congressional intent, as well as the language of the statute, to impose an almost insurmountable burden of establishing "harm" for any distributor seeking redress at

the Commission.^{6/}

26. Congress provided the Commission with discretion to address other problems identified in Section 628(b) by prescribing rules which go beyond the "Minimum Contents of Regulations" specified in Section 628(c)(2).^{7/} Clearly, however, the Commission is not free to impose lesser requirements.

27. The "Minimum Contents" of the Commission's regulations are not discretionary; they are statutorily mandated. The Commission cannot simply ignore them.

^{6/} By inquiring into the geographic area relevant to its harm analysis, the Commission is seeking to apply traditional antitrust theory to the discrimination problem. Traditional antitrust theory, however, is inapplicable. The Cable Act created a new cause of action for discrimination. It was not intended to change the existing antitrust laws. In fact, a major concern during House consideration of this bill was that it avoid issues that would result in jurisdictional problems, including any antitrust implications. See, e.g., Section 27 of the Cable Act: "Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law."

^{7/} The requisite showing of "harm" contained in Section 628(b) would become applicable to acts or practices not specified in Section 628(c)(2).

B. The Existence of Discrimination Establishes a Prima Facie Case

28. The Commission proposes to require a complainant to establish a prima facie case by using a system of presumptions. The Commission considers implementing a two-step approach to determine (i) whether price differentials are justifiable or discriminatory and (ii) if discriminatory, whether the discriminatory practice has prevented or hindered significantly any multichannel video programming distributor from providing satellite programming to subscribers or consumers. The Commission asks commentors to identify practices that the Commission should consider to be "discriminatory." The Commission seeks comment on standards to distinguish discriminatory behavior from "legitimate business behavior." (¶¶ 15, 16).

29. This approach, again, is contrary to the plain language of the Cable Act, which directs the Commission as a general matter to establish rules which, at a minimum, prohibit discrimination in price, terms or conditions. Congress has made it clear that discrimination itself is unlawful, causing harm per se. All that should be required to establish a prima facie case of discrimination at the FCC is for the complainant to demonstrate differences in prices,

terms or conditions. The burden to justify the discrimination under one of the specified exceptions (e.g., creditworthiness, costs, economies of scale) then shifts to the programming vendor.

30. The statute does not require a distributor to demonstrate that discrimination has prevented or hindered significantly the distributor from providing programming to subscribers or consumers. It does not require the Commission to identify "practices" that are "discriminatory." To the contrary, the statute makes it clear that -- at a minimum -- all discrimination must be prohibited by the Commission unless justified by the program vendor in a particular case under the specific exceptions contained in Section 628(c)(2)(B)(i)-(iv).

C. **"Justification" for Discrimination is an Affirmative Defense of the Programming Vendor**

31. *The Commission asks for comment on defining and measuring the factors that could justifiably explain a price differential (e.g., creditworthiness, costs, and economies of scale. (§ 17). In regard to costs, the Commission states that the delivery of an encrypted signal to HSD subscribers may be more expensive and less secure from piracy than delivery to the headend of a cable system.*

(¶ 17). *The Commission notes at Footnote 31, however, that during the Commission's satellite carrier discrimination Inquiry it was determined that some disparities in prices in the HSD market were not justified by the costs of providing service. Detailed, specific evidence regarding costs and unfair practices in distributing cable programming is requested (¶ 13).*

32. Again, the Commission's emphasis is misplaced. The Commission fails to stress: (1) that discrimination is prohibited by the statute and (2) that program vendors bear the heavy burden of justifying any discrimination in price, terms and conditions. It is not necessary for an aggrieved distributor to prove that discrimination is not justified.

33. The Commission already has examined ad nauseam the track record of the cable industry.^{8/} Congress itself analyzed this problem for years and determined to take strong corrective action. It is unclear why the Commission in this proceeding is now soliciting detailed evidence regarding costs and "unfair practices in distributing programming." (¶ 12). The purpose of this FCC proceeding is simply to implement Congressional directives; it is not

^{8/} See, e.g., footnote 2, supra, and Cable Report, supra.

necessary for the FCC to investigate the discrimination problem de novo or to conduct an adjudicatory-type inquiry into the costs of providing service.

34. "Cost" is an affirmative defense to a charge of discrimination. [47 U.S.C. 548(c)(2)(B)(ii)]. The cost issue will depend upon unique facts presented in any particular case, and it must be resolved on an ad hoc basis. In light of the many inquiries the Commission already has conducted into the issue of costs involved in providing programming services, however, the Commission at least should have emphasized in this proceeding that programmers' typical costs in serving different types of distributors clearly do not justify their discriminatory prices. Indeed, this fact has been recognized by the Commission and was a prime motivation for Congress to adopt the program access provisions.

D. The Proposed "Options" for Evaluating "Justification" for Discrimination are Inappropriate

35. *The Commission asks for recommendations as to benchmarks or "proxies" that could be used for the various permissible causes of pricing differentials. (¶ 17). The Commission asks whether it could assign an appropriate*

magnitude of price differential that could be attributed to each factor to avoid resorting to an ad hoc justification in every case based on demonstrations of specific costs and circumstances. Four options are proposed as standards that could be applied in distinguishing between "discriminatory" and "justifiable" price differences.

36. Option One: Allowance for a "Reasonable" Price Differential (§ 20). *The Commission asks whether it could develop a reasonable range of price differentials within which it would be rebuttably presumed that a disparity in price is not discriminatory. The Commission states that this approach is appropriate because the statute expressly allows for permissible factors for price differentials.*

37. *This approach ignores the clear Congressional directive to the FCC to prohibit discrimination in price, terms and conditions. Instead, it implies that a "little" discrimination is acceptable. There is no basis in the statute for this approach.*

38. Option Two: Section 202 of the Communications Act (§ 21). *The Commission notes that under Section 202, a complainant must show (1) that the services in question are "like," (2) that discrimination has occurred, and (3) that*

such discrimination is not just or reasonable. The Commission notes at Footnote 40 that NRTC's Complaints against certain satellite carriers in fact were dismissed because 202 is not applicable to non-common carrier services. Nevertheless, the Commission asks whether 202 could be applied as a standard in evaluating conduct under Section 19. The Commission says that Section 202 could offer the most appropriate standard because it addresses the term "unlawful discrimination."

39. The Section 202 model is wholly inappropriate under the Cable Act. The new statute does not require a showing that services are "like." Congress prohibited discrimination in the provision of satellite cable programming and satellite broadcast programming among or between cable operators and other multichannel video programming distributors. [47 U.S.C. 548(c)(2)(B).] "Satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt for cable operators for their retransmission to cable subscribers but does not include satellite broadcast programming. Section 628(i)(1); 47 U.S.C. 605(d)(1). "Satellite broadcast programming" means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting

such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. Section 628(i)(3); 47 U.S.C. 548(i)(3). "Multichannel video programming distributor" is defined to mean a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service or a television receive-only satellite program distributor. See, 47 U.S.C. 531 (12). The need to determine "likeness," therefore, is completely irrelevant under the statute.

40. Similarly, "unlawful discrimination" is no longer at issue under the statute. All discrimination is prohibited under the express language of Section 19 but for the specific exceptions provided.

41. Option Three: Antitrust Standards (§ 22). The Commission states that although the Robinson-Patman Act is generally applied to the pricing of goods or commodities rather than services, Section 628 provides ample authority for the Commission to apply appropriate standards to program pricing for the cable industry and other multichannel competitors. Furthermore, as the Robinson-Patman Act governs price differences for "goods of like grade or quality," the Commission asks how this standard might apply